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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

WILLIAM G. MCELROY,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

AND OTHER CASES

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

---

PETITION FOR WRIT OF CERTIORARI

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December 1994

QUESTION PRESENTED

WHETHER THE INSTRUCTIONS ON VESTED BENEFITS GIVEN AT TRIAL BY THE MILITARY JUDGES IN QUESTION WERE INACCURATE, VIOLATIVE OF THE COLLATERAL CONSEQUENCES RULE AND, IN ADDITION, A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE 5TH AMENDMENT OF THE UNITED STATES CONSTITUTION

LISTING OF PARTIES PURSUANT TO RULE 24.1(b)

WILLIAM G. MCELROY, United States Air Force
USCAAF Dkt No. 93-0946/AF

ANTHONY P. DUCHINSKY, United States Air Force
USCAAF Dkt No. 93-0963/AF

JOSEPH B. OWENS, United States Air Force
USCAAF Dkt No. 93-1323/AF

TRAVIS J. MARTZ, United States Air Force
USCAAF Dkt No. 94-1189/AF

MICHAEL F. HEBERT, United States Air Force
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR WRIT OF CERTIORARI

The petitioners, William G. McElroy, et al., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Armed Forces entered in this proceeding.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Armed Forces in *United States v. McElroy*, 40 M.J. 368 (C.M.A. 1994) is reprinted as Appendix A. The unreported decision of the United States Air Force Court of Criminal Appeals in *United States v. McElroy*, issued

on March 24, 1993 is attached as Appendix B. The final order of the United States Court of Appeals for the Armed Forces affirming the decision of the Air Force Court of Criminal Appeals in *United States v. Duchinsky*, —— M.J. —— (C.M.A 1994) is reprinted at Appendix C. The final order of the United States Court of Appeals in *United States v. Owens*, —— M.J. —— (C.M.A. 1994), is reprinted at Appendix D. The final order of the United States Court of Appeals in *United States v. Martz*, —— M.J. —— (C.M.A. 1994), is reprinted at Appendix E. The final order of the United States Court of Appeals in *United States v. Hebert*, —— M.J. —— (C.M.A. 1994), is reprinted at Appendix F.

JURISDICTION

The final orders of the United States Court of Appeals for the Armed Forces were entered between 19 September 1994 and 5 October 1994. The jurisdiction of this Court is invoked under 28 USCA § 1259(3) (Supp. 1992) and 10 USCA § 867(a) (Supp. 1992).

STATEMENT OF THE CASE

This is a consolidated petition representing interested service members of various ranks from the United States Air Force whose convictions were affirmed by the United States Court of Appeals for the Armed Forces between 19 September and 5 October 1994 based on its decision in *United States v. McElroy*. (Appendix A). In each of the five cases, the members of the court-martial panel were improperly instructed by the military judge that veterans benefits from previous periods of honorable service were "vested". In each case, this instruction was given after testimony was presented to the members that the accused had a previous period of honorable service. By way of example, in *United States v. McElroy*, the military judge instructed the members in pertinent part as follows:

> This court can adjudge a dishonorable discharge or a bad-conduct discharge. Such a discharge deprives one

> of substantially all benefits administered by the Department of Veterans Affairs and for that matter by the Department of the Air Force that are based on the current term of service. *However, vested benefits from a prior period of honorable service are not forfeited by a receipt of a dishonorable discharge or a bad-conduct discharge that would terminate the accused's current term of service.*

R. 173, emphasis added. In a previous opinion on this instruction, *United States v. Longhi*, 36 M.J. 988 (A.F.C.M.R. 1993), the Air Force Court of Criminal Appeals noted that, while the use of the term "vested" was not technically correct, the "essence" of the instruction was. 36 M.J. at 989. In *United States v. McElroy*, 40 M.J. 368 (C.M.A. 1994) (Appendix A), the United States Court of Appeals for the Armed Forces, affirmed the position of the Air Force Court of Criminal Appeals in *Longhi* and *McElroy* by holding that it was not persuaded that such an instruction would clearly or substantially mislead the members. 40 M.J. at 372.

REASON FOR GRANTING THE WRIT

THE INSTRUCTIONS ON VESTED BENEFITS GIVEN AT TRIAL BY THE MILITARY JUDGES IN QUESTION WERE INACCURATE, VIOLATIVE OF THE COLLATERAL CONSEQUENCES RULE AND, IN ADDITION, A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE 5TH AMENDMENT OF THE UNITED STATES CONSTITUTION

A. The Instructions Were Inaccurate

In a letter issued from the Office of the General Counsel, Department of Veterans Affairs, Mr. John H. Thompson, Assistant General Counsel, made pointedly clear that there is no such thing as "vested benefits." This is in stark contrast to the judges' erroneous instructions in these cases which affirmatively advised the members that the appellants' prior periods of honorable service had caused cer-

tain benefits to "vest." The military judges' advice to the members that said benefits were "vested" materially prejudiced the respective appellants. In each case, the members were misled into believing that adjudicating punitive discharges against the appellants would not effect their ultimate receipt of their veterans benefits.

An accused is entitled to the members receiving a correct instruction if the military judge endeavors to give one. Unlike the issue in *United States v. Goodwin*, 33 M.J. 18 (C.M.A. 1991), the military judges in the cases at bar gave incorrect instructions, rather than omitted the instruction regarding the benefits administered by the Veterans' Administration. *Id.* at 19. Accordingly, the military judges committed plain error. *United States v. Young*, 105 S. Ct. 1038 (1985); *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986). The appellants were entitled, "and ha[d] a right to a fair trial in accordance with the Uniform Code of Military Justice" *United States v. Rowe*, 11 M.J. 11, 13 (C.M.A. 1981). The judges' erroneous instructions deprived them of this right.

B. The Instructions Violated The Collateral Consequences Rule

In addition to being just plain incorrect, the military judges' instructions on purportedly "vested" benefits clearly runs afoul of the collateral consequences rule: "The general rule concerning collateral consequences of a sentence is that 'courts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration.' " *United States v. Griffin*, 25 M.J. 423, 424 (C.M.A. 1988). *cert. denied*, 487 U.S. 1206 (1988); *United States v. Henderson*, 29 M.J. 221 (C.M.A. 1989); *United States v. Murphy*, 26 M.J. 454 (C.M.A. 1988); *United States v. Quesinberry*, 12 U.S.C.M.A. 609, 612, 31 C.M.R. 195, 198 (1962). Clearly, the instruction in question is solely

concerned with collateral administrative consequences, namely, administrative benefits administered by the Veterans Administration. Under established precedent, there is simply no reason for a military judge to be getting into such an area of the law during a sentencing proceeding, except perhaps, to benefit the government in increasing the likelihood of a punitive discharge.

C. The Instructions Violated The Equal Protection Clause Of The 5th Amendment Of The United States Constitution

Lastly, appellants would also submit that the instructions given by the military judges also violated the Equal Protection Clause of the Fifth Amendment since they ironically placed individuals with previous Honorable Discharges in worse positions than those individuals without such periods of prior honorable service! In other words, common sense dictates that a panel would be much more willing to discharge an individual if it believed that that individual would not be deprived of his or her veteran's benefits. Clearly, the instructions given by the military judges in the cases *sub judice* were not designed to benefit the respective appellants. On the contrary, such an instruction could only benefit the prosecution by removing a psychological barrier to discharging people who are clearly in need of their Veterans' Administration benefits. Accordingly, the dissimilar treatment afforded the petitioners and those individuals without such previous Honorable Discharges violates the Equal Protection clause of the Fifth Amendment.

CONCLUSION

By giving the inaccurate, constitutionally defective instructions concerning the collateral administrative consequences of a punitive discharge, the military judges in the cases *sub judice*, virtually guaranteed that the respective appellants would be punitively separated from the Air Force. These erroneous instructions, which rise to the level of plain error, will have significant, negative, life long consequences for each of the appellants concerned. Consequently, this Honorable Court should grant this petition for a writ of certiorari and give clear guidance to the military justice system with regard to the extent that instructions to members should be concerned with the collateral, administrative consequences of a criminal conviction.

Respectfully submitted,

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December 1994

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 93-0946
CMR No. 29327

UNITED STATES,
Appellee

v.

WILLIAM G. MCELROY, AIRMAN FIRST CLASS
U.S. AIR FORCE,
Appellant

Argued May 5, 1994
Decided Sep. 19, 1994

Counsel

For Appellant: *Captain Eric N. Eklund* (argued); *Colonel Jay L. Cohen* (on brief); *Colonel Terry J. Woodhouse* and *Captain David D. Jividen.*

For Appellee: *Captain Jane M.E. Peterson* (argued); *Colonel Jeffery T. Infelise* (on brief).

Military Judge: Michael A. Kilroy

Opinion of the Court

SULLIVAN, Chief Judge:

Appellant was tried by a general court-martial composed of officers at Yokota Air Base, Japan, on March 13 and 14, 1991. Pursuant to his pleas, he was found guilty

of larceny (three specifications), attempted larcency, driving while drunk, impersonating a noncommissioned offier, and dishonorable failure to pay a just debt, in violation of Articles 121, 80, 111, and 134, Uniform Code of Military Justice, 10 USC §§ 921, 880, 911, and 934, respectively. He was sentenced to a bad-conduct discharge, confinement for 4 years, total forfeitures, and reduction to the lowest enlisted grade. On May 31, 1991, the convening authority approved the sentence. On February 24, 1993, the Court of Military Review affirmed the findings and sentence in an unpublished opinion. Note that Volumes II-V of the Record of Trial filed in this Court have nothing to do with the case dealt with in this opinion. Why those extraneous volumes have been filed here is a mystery. If judicial notice had been taken of the earlier record, it is not necessary to include that record with the present record, so long as it is available upon request.

This Court granted review of the following issues:

I

WHETHER THE COURT-MARTIAL LACKED JURISDICTION TO TRY APPELLANT SINCE IT WAS IMPROPERLY CONSTITUTED.

II

WHETHER THE MILITARY JUDGE ERRED, TO THE SUBSTANTIAL PREJUDICE OF APPELLANT, WHEN HE ERRONEOUSLY INSTRUCTED THE MEMBERS THAT, EVEN IF A PUNITIVE DISCHARGE WERE IMPOSED, APPELLANT WOULD BE ENTITLED TO "VESTED" VETERANS' BENEFITS FROM PRIOR ENLISTMENTS.

We hold that the military judge's failure to have announced the names and ranks of the court-martial mem-

bers sitting in appellant's case was harmless error. Art. 59(a), UCMJ, 10 USC § 859(a). Furthermore, we hold that the military judge's sentencing instructions which characterized appellant's veterans' benefits as "vested" were substantially correct and did not prejudice him. *See United States v. Goodwin*, 33 MJ 18 (CMA 1991), and *Waller v. Swift*, 30 MJ 139 (CMA 1990).

The record of trial in this case contains a convening order delineated Special Order AB-14 dated March 5, 1991. It states, *inter alia*:

> A general court-martial is hereby convened. It may proceed at Yokota Air Base, Japan, to try such persons as may be properly brought before it. The court will be constituted as follows:
>
> Col David M. Reed
> Col Laurence M. Jones
> Lt Col John D. Power
> Lt Col Joseph L. Edwards
> Lt Col Dean H. Haylett
> Major Jerry L. Pippins, Jr.
> Capt Robert L. Mason
> Capt Barbara S. Fink
> Capt Gary N. Carlton

During a session under Article 39(a), UCMJ, 10 USC § 839(a), prior to entry of pleas, trial counsel referred to this order which was attached to the record. He stated:

> TC: This Court is convened by Special Order AB-14, Headquarters Fifth Air Force dated 5 March 1991, copies of which have been furnished to the military judge, counsel, the accused and to the reporter for insertion at this point in the record. The charges have been properly referred to this court for trial. Lieutenant General J.B. Davis was in command at the time of the referral of the charges and specifications and is still in command. The charges

were served on the accused on the 7 March 1991. The prosecution is ready to proceed with the trial in the case of the *United States versus Airman First Class William G. McElroy*, who is present in court.

* * * * *

The members named in the convening order are absent.

After entry and acceptance of appellant's pleas of guilty, the sentencing portion of his court-martial began. The following discussion appears in the record:

MJ: Trial counsel, if you will please—I'm sorry. The accused in this case is Airman First Class William C. McElroy.

Trial Counsel, please review the convening orders with the members of the court.

TC: Yes, sir. This court is convened by Special Order Number AB-14, Headquarters, Fifth Air Force, dated 5 March 1991, a copy of which has been furnished to each member of the court. Would each of you please examine your copy of the order carefully and tell me if there are any errors or corrections to be made.

MEM: (Captain Mason) Correction. On MAJCOM designation it is not AFCC, but it is PACAF.

MJ: Thank you, Captain Mason. Any other corrections we need to make?

Apparently not. The one correction will be noted and placed in the record at the appropriate places.

TC: The prosecution is ready to proceed with the trial in the case of the *United States versus Airman First Class William G. McElroy* who is present in court.

MJ: Thank you, counsel. *I would just like to note for the record that all members are present.* The members will now be sworn. All persons will please rise.

(All persons rose and the members were sworn by the trial counsel.)

MJ: Thank you. You may be seated. The court is now assembled.

(Emphasis added.)

Voir dire by the parties and the military judge was then conducted. Peremptory challenges and challenges for cause were then made by the parties and acted on by the judge. The record then states:

MJ: Very well. The colonel will be excused from the panel. Before we adjourn this 39(a) session, is there anything else that we can take up prior to checking to see on the status of our members?

TC: Not that I'm aware of, sir.

DC: No, sir.

MJ: Very well. I believe we told them not to be here until 0830 and we're running just a tad ahead of schedule so we'll take a recess sufficient to have all the members. In the meantime, let's go ahead and do the reordering of the panel. And trial counsel, just make sure that the two execused members, Colonel Jones and Major Pippins, are instructed that they have been excused. Of course, thank them for their time. We are adjourned.

(The Article 39(a) session was adjourned at 0825 hours, 14 March 1991, and the court was called to order at 0832 hours, 14 March 1991, with all parties to the trial present who were present when the Article 39(a) session adjourned. The members were present.)

TC: I note for the record that Major Pippins and Colonel Jones have been excused.

MJ: And Colonel Reed as well, although I think we had that on the record yesterday.

The president of this court-martial later asked the judge about the effect that a bad-conduct discharge and a dishonorable discharge would have on appellant's ability to receive veterans' benefits, specifically medical treatment. The military judge instructed the members that it is not the practice of courts-martial to be concerned with the administrative effects of various discharges. Nevertheless, the military judge said in part:

> This court may adjudge a dishonorable discharge or a bad-conduct discharge. Such a discharge deprives one of substantially all benefits administered by the Department of Veterans Affairs and for that matter by the Department of the Air Force that are based on the current term of service. *However, vested benefits from a prior period of honorable service are not forfeited by receipt of a dishonorable discharge or bad-conduct discharge that would terminate the accused's current term of service.*

(Emphasis added.)

I

COURT-MARTIAL JURISDICTION

Appellant initially claims that the court-martial which sentenced him was improperly constituted. He asserts that RCM 813(a)(4), Manual for Courts-Martial, United States, 1984, requires that a military judge "ensure" that the "names and ranks" of all present members are "announced" on the record. *Cf.* RCM 901(b). He then argues that the military judge's failure to comply with this provision created an impermissible doubt concerning the

precise composition of his court-martial. *Cf. United States v. Fell*, 33 MJ 628, 632 (ACMR 1991).

RCM 813(a) states:

> (a) *Opening sessions.* When the court-martial is called to order for the first time in a case, the military judge shall ensure that the following is announced:
>
> * * * * *
>
> (4) The names and ranks of the members, if any, who are present.
>
> (5) The names and ranks of members who are absent, if presence of members is required.

RCM 901(b) further states:

> (b) *Announcement of parties.* After the court-martial is called to order, the presence or absence of the parties, military judge, and members shall be announced.

See generally Art. 36(a), UCMJ, 10 USC § 836(a).

We initially note that this was a guilty-plea case at an Article 39(a) session. The Military judge accepted appellant's pleas of guilty and entered findings of guilty in accordance therewith. The members, however, were not required to be present at the Article 39(a) session which constituted the findings portion of this court-martial. *See* RCM 803 and 805. *See generally* RCM 911. Accordingly, no error occurred under RCM 813(a)(4) when the military judge failed to announce the names and ranks of the detailed members at that time.

The military judge then adjourned the Article 39(a) session. Some 51 minutes later he called the court-martial to order for the first time to conduct the sentencing portion of this court-martial. He then announced that all members detailed were present. He permitted *voir dire*, excused three members, and expressly noted their absence. Although such action constituted compliance with

RCM 901(b), we conclude that the military judge's failure to have the names and ranks of members announced at this time violated RCM 813(a)(4). *See* Drafters' Analysis of RCM 813 and 901, Manual, *supra* at A21-45. *See also* para. 61*c*, Manual for Courts-Martial, United States, 1969 (Revised edition).

Such error does not require reversal of appellant's sentence. In his case, there was no objection by defense counsel to the military judge's failure to announce this information at that time. *See* RCM 905(e).[1] Moreover, the names and ranks of the members who sat in this case are readily apparent from this record even without formal announcement by the military judge.[2] Finally, appellant has not offered any evidence that his panel contained an interloper or that any member who should have sat on his case was absent or that he otherwise suffered any prejudice. Accordingly, we find any error by the judge in this regard to be harmless. Art. 59(a), UCMJ, 10 USC § 859(a). This conclusion in no way diminishes the duty of military judges to comply with RCM 813(a)(4).

---

[1] RCM 905(e), Manual for Courts-Martial, United States, 1984 (Change 4), states:

> (e) *Effect of failure to raise defenses or objections.* Failure by a party to raise defenses or objections or to make motions or requests which must be made before pleas are entered under subsection (b) of this rule shall constitute waiver. The military judge for good cause shown may grant relief from the waiver. Other motions, requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is adjourned for that case and, unless otherwise provided in this Manual, failure to do so shall constitute waiver.

[2] *See United States v. Fell*, 33 MJ 628, 632-34 (ACMR 1991), *citing United States v. Wheatcraft*, 23 MJ 687 (AFCMR 1986), *pet. denied*, 24 MJ 54 (1987); and *United States v. Staton*, 48 CMR 250 (ACMR 1974)); *United States v. Kaopua*, 33 MJ 712 (ACMR 1991).

II

SENTENCE INSTRUCTIONS

Appellant next asserts that the military judge's instructions to the members concerning "vested" veterans' benefits were erroneous and unfairly prejudiced him with respect to the punitive discharge which he received. In particular, he cites a letter from the Assistant General Counsel of the Department of Veterans Affairs, and he asserts "that there is no such thing as 'vested benefits.'" Appellant argues that the members of his court-martial "were mislead into believing that adjudicating a punitive discharge against [him] would not affect his veterans' benefits" resulting from his prior service. Final Brief at 7.

We first note that the general rule at courts-martial is that instructions on collateral administrative consequences of a sentence should be avoided. *United States v. Griffin*, 25 MJ 423, 424 (CMA, *cert. denied*, 487 U.S. 1206 (1988).[3] Defense counsel in this case, however, stated that he had no objection to the military judge's sentencing instructions. RCM 1005(f).[4] In these circumstances, we will not set aside a sentence based on an erroneous instruction unless it constitutes plain error.

---

[3] There we stated that

> the general rule concerning collateral consequences of a sentence is that "courts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration." *United States v. Quesinberry*, 12 USCMA 609, 612, 31 CMR 195, 198 (1962). We see no need to relax this rule today.

[4] This rule provides:

> (f) *Waiver.* Failure to object to an instruction or to omission of an instruction before the members close to deliberate on the sentence constitutes waiver of the objection in the absence of plain error. The military judge may require the party objecting to specify in what respect the instructions were improper.

In this regard, we conclude that appellate defense counsel's construction of the Assistant General Counsel's letter is somewhat broad. This letter more narrowly states:

> We note initially that VA benefits, which are gratuitous in nature do not "vest" in the sense that a right to such benefits can be thought to exist prior to application therefor and adjudication of entitlement by VA.

The challenged instructions, however, do not define what "vested" means, and we do not construe them to reasonably suggest a meaning contrary to that noted above. Accordingly, accepting this technical definition of the word "vested," we are still not persuaded that judge's instructions in this case clearly or substantially misled the members. *See United States v. Goodwin*, 33 MJ 18 (CMA 1991); *Waller v. Swift*, 30 MJ 139, 144 (CMA 1990).

Finally, the above letter proceedes to state that "unless the Secretary of Veterans Affairs determines [under § 6105] that an individual is guilty of" a particular offense (mutiny, treason, sabotage, assisting the enemy, sedition, spying etc.) "a discharge under dishonorable conditions does not bar that individual from receiving gratuitous benefits administered by VA, including burial in a national cemetery, based on a prior period of service which terminated under conditions other that dishonorable." We also recognize that appellant's offenses do not include acts of disloyalty toward the United States or its allies which may bar his eligibility for receiving benefits. *See* 38 USC §§ 6103(d)(1), 6104, and 6105(b). Thus, while the instruction given by the military judge might not be applicable in all cases, the message conveyed to the members in this case was substantially accurate.

The parties shall be given the opportunity to be heard on any objection outside the presence of the members.

The decision of the United States Air Force Court of Military Review is affirmed.

Judges COX, CRAWFORD, GIERKE, and WISS concur.

APPENDIX B

UNITED STATES AIR FORCE COURT
OF MILITARY REVIEW

ACM 29327

UNITED STATES

v.

AIRMAN FIRST CLASS WILLIAM G. MCELROY,
FR229-70-8024
UNITED STATES AIR FORCE

---

24 February 1993

Sentence adjudged 14 March 1991 by GCM convened at Yokota Air Force Base, Japan. Military Judge; Michael A. Kilroy.

Approved sentence: Bad-conduct discharge, confinement for 4 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Jeffrey R. Owens, Major Alice M. Kottmyer, and Captain David D. Jividen.

Appellate Counsel for the United States: Lieutenant Colonel Brenda J. Hollis, Major Paul H. Blackwell, Jr., Captain James C. Sinwell.

Before

LEONARD, JAMES, and JOHNSON
Appellate Military Judges

PER CURIAM:

Airman McElroy was convicted of stealing and attempting to steal money by repeatedly drawing advances of travel pay, deliberately exceeding the likely entitlements, and deliberately never settling the accounts. He was also convicted of driving while drunk, impersonating a technical sergeant, and dishonorably failing to pay a debt. He assigned several errors, but we find no merit in them, and we affirm the findings and sentence.

I. Jurisdiction

Airman McElroy was twice convicted by courts-martial. We now review his second conviction. He contends that he could have been discharged as the result of the sentence in the first case, which included a bad-conduct discharge. That might have interrupted jurisdiction. *United States v. Clardy*, 13 M.J. 308 (C.M.A. 1982). However, the military judge inquired into this matter twice on the record, and both times Airman McElroy denied having been discharged. No evidence shows otherwise. No relief is warranted.

II. No Roll-Call

Nine members were detailed to the court-martial. Three were excused upon challenges, leaving six, and the parties note that six remained. Of those six, all but two are identified by name on the record. The identities of those two are never stated in the record, just as Airman McElroy argues.

Airman McElroy assigns as error, "The court-martial lacked jurisdiction to try appellant since *it was improperly constituted.*" (Emphasis added.) In fact, he argues only

that the record does not explicitly show that two of the detailed members were present. There is no hint in the record that any interloper was present or that the court-martial ever proceeded without a quorum, *see* R.C.M. 805(b), and Airman McElroy does not argue those ideas. He simply relies on the silence in the record as his only ground for relief.

A military judge is required to account for the members. R.C.M. 813(a)(4), 901(b). However, we have held previously that reversal is not required if the identities of the members present are otherwise discernible from record, and we have used logical inferences to do so. *United States v. Wheatcraft*, 23 M.J. 687, 689 (A.F.C.M.R. 1986), *pet. denied*, 24 M.J. 54 (C.M.A. 1987); *see United States v. Fell*, 33 M.J. 628, 632-34 (A.C.M.R. 1991) (not jurisdictional, and inferences may be relied upon to resolve the issue); *United States v. Kaopua*, 33 M.J. 712 (A.C.M.R. 1991) (reiterates *Fell*); *United States v. Staton*, 48 C.M.R. 250 (A.C.M.R. 1974) (based solely on requirements of MCM, error not prejudicial where members could be accounted for). Appellate counsel for the United States has offered its logic for the proposition that the two members not named in the record did sit, and we agree with it. Accordingly, there is no substantial error but simply a less than perfect job by the military judge at some of the bookeeping that is ubiquitous in military trial procedure. No prejudice resulted from that failure, and no relief is warranted. Article 59(a), UCMJ.

III. Veterans Benefits

Airman McElroy complains that the military judge incorrectly described the effect of a court-martial conviction upon eligibility for veterans' benefits. He offers an opinion of the General Counsel of the Veterans Administration as authority. We find the military judge's instruction to be, under the facts of this case, consistent

with the approach to eligibility described in that opinion, except for the military judge's inaccurate use of the word "vested." As Airman McElroy notes, veterans' benefits do not "vest." However, the flaw is hardly a significant error of law in the instruction in this trial, and it could not conceivably have prejudiced Airman McElroy. No relief is warranted. Article 59(a), UCMJ.

IV. Credit for Pretrial Confinement

Airman McElroy was confined before trial. He argued at trial that he was due additional credit for his pretrial confinement because it was illegal. The military judge entered findings of fact, and we adopt them because we find support for them in the record, *see United States v. Middleton*, 10 M.J. 123, 133 (C.M.A. 1981). He then denied the additional credit.

The findings resolve Airman McElroy's first complaint, that the wrong commander reviewed the confinement under R.C.M. 305(h)(2). Once explained, it was apparent that the confusion resulted because the unit to which Airman McElroy had been assigned had been deactivated and succeeded by a similar unit with a different name. No relief is due on this theory.

His remaining theory is that there was inadequate cause for the magistrate to direct continued confinement under R.C.M. 305(i). A military judge's review of a magistrate's decision to continue pretrial confinement under R.C.M. 305(i) is reviewable only for an abuse of discretion. R.C.M. 305(j)(1)(A); *United States v. Sharrock*, 30 M.J. 1003, 1005 (A.F.C.M.R. 1990), *rev'd on other grounds*, 32 M.J. 326 (C.M.A. 1991); *United States v. Rolfe*, 24 M.J. 756 (A.F.C.M.R. 1987). We find no abuse, and no relief is warranted.

V. Tenure

Airman McElroy also complains that military trial and appellate judges lack tenure in the sense that they do not

serve for fixed terms. During the pendency of his appeal, that issue was resolved in *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992). There is no military right to have a case heard before tenured judges. He is entitled to no relief.

The findings and the sentence are correct in law and fact, and they are—

AFFIRMED.

[SEAL OMITTED]

OFFICIAL

/s/ Naomi D. Allen
NAOMI D. ALLEN
TSgt, USAF
Chief Court Administrator, AFCMR

APPENDIX C

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 93-0963/AF
CMR Dkt. No. S28589

UNITED STATES,
Appellee

v.

ANTHONY P. DUCHINSKY (121-64-5715),
Appellant

ORDER

On further consideration of the granted issue (39 MJ 62) in light of *United States v. McElroy*, No. 93-0946 (CMA Sept. 19, 1994), it is, by the Court, this 28th day of September, 1994

ORDERED:

That the decision of the United States Air Force Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (JIVIDEN)
Appellate Government Counsel (INFELISE)

APPENDIX D

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 93-1323/AF
CMR Dkt. No. 29751

UNITED STATES,
Appellee

v.

JOSEPH B. OWENS (216-11-0315),
Appellant

ORDER

On further consideration of the granted issue (39 MJ 340) in light of *United States v. McElroy*, No. 93-0946 (CMA Sept. 19, 1994), it is, by the Court, this 28th day of September, 1994

ORDERED:

That the decision of the United States Air Force Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (MOUL)
Appellate Government Counsel (INFELISE)

APPENDIX E

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. 94-1189/AF
CMR Dkt. No. 29719

UNITED STATES,
Appellee

v.

TRAVIS J. MARTZ (569-41-0754),
Appellant

ORDER

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Military Review, it is by the Court this 5th day of October, 1994,

ORDERED:

That said petition is hereby granted on the issue raised by appellate defense counsel; and

That the decision of the United States Air Force Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (CARNES)
Appellate Government Counsel (INFELISE)

APPENDIX F

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 94-0445/AF
CMR Dkt. No. 29622

UNITED STATES,
Appellee

v.

MICHAEL F. HEBERT (014-48-0163),
Appellant

ORDER

On further consideration of the granted issue (Daily Journal July 26, 1994) in light of *United States v. McElroy*, No. 93-0946 (CMA Sept. 19, 1994), it is, by the Court, this 28th day of September, 1994

ORDERED:

That the decision of the United States Air Force Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (ANDIA)
Appellate Government Counsel (INFELISE)

☆ U. S. GOVERNMENT PRINTING OFFICE: 1994 385096 24016

FILED

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No. ——

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

WILLIAM G. McELROY,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

AND OTHER CASES

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

JAY LINDSEY COHEN
Colonel, United States Air Force
Chief, Appellate Defense Division
Counsel of Record

ERIC N. EKLUND
Captain, United States Air Force
Appellate Defense Counsel
Counsel for the Petitioner

AIR FORCE LEGAL SERVICES AGENCY
172 Luke Avenue, Suite 343
Bolling AFB, DC 20332-5113
(202) 767-1562

January 1995

16

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

UNITED STATES

v.

SERGEANT ANTHONY P. DUCHINSKY, FR121-64-5715
UNITED STATES AIR FORCE

ACM S28589
31 March 1993

Sentence adjudged 15 August 1991 by SPCM convened at Andersen Air Force Base, Guam. Military Judge: Michael A. Kilroy.

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Jeffrey R. Owens, Captain David D. Jividen, and Captain Michael C. Barrett.

Appellate Counsel for the United States: Lieutenant Colonel Brenda J. Hollis, Major Paul H. Blackwell, Jr., Major John H. Kongable, and Captain Thomas E. Wand.

Before

O'HAIR, SNYDER, and GRUNICK
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the assignment of errors, and the government's reply thereto and have concluded that the findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the substantial rights of the accused was committed. *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982); *United States v. Longhi*, —— M.J. ——, ACM S28621 (A.F.C.M.R. 5 March 1993). Accordingly, the findings of guilty and the sentence are

AFFIRMED.

OFFICIAL

NANCY J. EUELL
Documents Examiner
Court of Military Review

SA-3

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

UNITED STATES

v.

Senior Airman JOSEPH B. OWENS, FR216-11-0315
UNITED STATES AIR FORCE

ACM 29751

24 June 1993

Sentence adjudged 21 November 1991 by GCM convened at Hahn Air Base, Federal Republic of Germany. Military Judge: Michael B. McShane.

Approved sentence: Bad-conduct discharge, confinement for 12 months, forfeiture of $200 pay per month for 5 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Jeffrey R. Owens, Major Alice M. Kottmyer, and Major Marc A. Fox.

Appellate Counsel for the United States: Lieutenant Colonel Brenda J. Hollis, Major Paul H. Blackwell, Jr., and Captain James C. Sinwell.

SA-4

Before

O'HAIR, SNYDER, and GRUNICK
Appellate Military Judges

PER CURIAM:

Pursuant to pleas of guilty, appellant stands convicted of extortion and conspiracy, violations of Articles 127 and 81, UCMJ. We find no error and affirm.

Appellant complains the sentence was inappropriately severe. The maximum sentence authorized in this case was a dishonorable discharge, 6 years confinement, total forfeitures, and reduction to E-1. The sentence adjudged at trial was a bad-conduct discharge, 12 months confinement, forfeitures of $200 pay per month for 5 months, and reduction to E-1.

Appellant and his spouse engaged in conspiracy to take compromising photographs of Captain T naked with appellant's wife. After appellant obtained accusatory photos of Captain T, he threatened to disclose them to Captain T's wife and commander unless he received $500. Captain T reported the extortion attempt to investigators and appellant was apprehended following the extortion payoff.

According to appellant, prior to the incidents leading to this court-martial, his wife had affairs with another airman and Captain T. He asserts these court offenses were committed in response to his wife's provocation and in revenge for betrayal by Captain T, who had been providing marriage counseling to appellant and his wife. The evidence also indicates appellant was upset over a recent Article 15 punishment he had received for assaulting his wife, precipitated by her activity with Captain T. In its context, we do not find the sentence unreasonably severe. *United States v. Healy,* 26 M.J. 394 (C.M.A. 1988).

Appellant also contends the military judge erred when he instructed the court members on the effects of a punitive discharge. We find no prejudicial error in the military judge's use of the term "vested" during his sentencing instructions. *United States v. Longhi,* 36 M.J. 988 (A.F.C.M.R. 1993).

The findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the substantial rights of the appellant was committed. Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

NAOMI D. ALLEN
Technical Sergeant, USAF
Chief Court Administrator, AFCMR

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

UNITED STATES

v.

SERGEANT TRAVIS J. MARTZ, FR569-41-0754
UNITED STATES AIR FORCE

ACM 29719(F rev)

17 May 1994

Sentence adjudged 10 December 1991 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: Kevin L. Daugherty.

Approved sentence: Bad-conduct discharge, confinement for 3 months, forfeiture of $500 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for Appellant: Major Marilyn A. Gordon, Major Alice M. Kottmyer, and Major Marc A. Fox.

Appellate Counsel for the United States: Colonel Richard L. Purdon, Colonel Jeffery T. Infelise, Lieutenant Colonel Robert E. Williams, Jr., Major Paul H. Blackwell, Jr., and Captain Thomas E. Wand.

Before

HEIMBURG, PEARSON, and SCHREIER
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the assignment of errors, and the government's reply thereto and have concluded that the findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the substantial rights of the appellant was committed. *See United States v. Longhi,* 36 M.J. 988 (A.F.C.M.R. 1993); *United States v. Hansen,* 36 M.J. 599, 612 (A.F.C.M.R. 1992), *pet denied,* 38 M.J. 229 (C.M.A. 1993). Accordingly, the findings of guilty and the sentence are

AFFIRMED.

OFFICIAL

NANCY J. EUELL
Documents Examiner
Court of Military Review

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

UNITED STATES

v.

Captain MICHAEL F. HEBERT, 014-48-0163
UNITED STATES AIR FORCE

ACM 29622

14 September 1993

Sentence adjudged 27 August 1991 by GCM convened at Andrews Air Force Base, Maryland. Military Judge: Richard T. Stansell-Gamm.

Approved sentence: Dismissal and confinement for 3 months.

Appellate Counsel for the Appellant: Colonel Jeffrey R. Owens, Colonel Terry J. Woodhouse, Major Marilyn A. Gordon, Major Alice M. Kottmyer, Major George F. May, and Major Mary C. Yastishock.

Appellate Counsel for the United States: Colonel Richard L. Purdon, Colonel Jeffery T. Infelise, Captain Thomas E. Wand, Captain Jules D. Silberberg, and Captain Jane M. E. Peterson.

Before

SNYDER, RAICHLE, and JAMES
Appellate Military Judges

OPINION OF THE COURT

SNYDER, Senior Judge:

Pursuant to his negotiated, conditional pleas, Captain Hebert was convicted by general court-martial of conduct unbecoming an officer and gentleman, adultery, and committing an indecent act with another, in violation of Articles 133 and 134, UCMJ, 10 U.S.C. §§ 933, 934 (1988). The adjudged sentence of dismissal and confinement for 3 months was approved by the convening authority. Captain Hebert raises six assignments of error for our consideration, none of which have merit, and we affirm.

I. SELECTIVE PROSECUTION

As mentioned, appellant was allowed to enter conditional pleas of guilty. *See* R.C.M. 910(a)(2).[1] Therefore, all issues raised by him at trial are preserved for review. His first assignment of error is that he was the victim of selective prosecution. After hearing evidence and entering findings, the military judge denied the motion.

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[1] The military judge approved the conditional pleas without making findings regarding the criteria for accepting conditional pleas as reflected in MCM, App. 21 at A21-52 (1984), which incorporates the criteria of Fed. R. Crim. P. 11(a)(2). We remind military judges to analyze the issue(s) an accused seeks to preserve via a condiitonal plea and make essential findings as to whether the issue(s), in fact, will be case dispositive. If not case dispositive, it is within the military judge's discretion to disapprove the conditional plea.

All of the offenses for which appellant was tried occurred in Bicester, England, where his unit was deployed during Operations Desert Shield/Storm. Appellant averred in support of his motion that conduct such as his was the norm in a deployment environment, and there was tacit acceptance of it as indicated by other instances of adulterous conduct known by him which went unpunished. However, appellant did not present any evidence of a similarly situated person within *his* command being treated differently than him. The argument most vigorously asserted by appellant at trial is that his two enlisted paramours received administrative reprimands rather than nonjudicial punishment [2] or trial by court-martial.

The test for whether one is the victim of selective prosecution is now well settled. An accused:

> [B]ears the heavy burden of establishing, at least *prima facie,* (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charges against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

United States v. Hagen, 25 M.J. 78, 83 (C.M.A. 1987), *cert. denied,* 484 U.S. 1060 (1988). Appellant failed in meeting his burden on both prongs of the *Hagen* test. First, he presented no evidence of his command treating similarly situated officers differently. Appellant's comparison of his plight with his enlisted paramours' was futile, for status as an officer may properly be considered when selecting disciplinary action. *United States v. Means,* 10

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[2] *See* Article 15, UCMJ, 10 U.S.C. § 815 (1988).

M.J. 162 (C.M.A. 1981). In an effort to meet the second prong of the *Hagen test,* appellant argued he was tried by court-martial solely because he exercised his right to silence when questioned by investigators. Again, he pointed to the corrective action taken against his enlisted paramours as support for his assertion. Appellant's commander, Brigadier General P, however, testified he was not even aware appellant had exercised his right to silence and, in any event, it would have played no part in his decision to prefer charges against appellant. General P testified he opted to prefer charges against appellant because officers must meet higher standards of conduct than enlisted personnel.

Appellant's commander did not use an impermissible standard in deciding to prefer charges against him. *Means,* 10 M.J. at 165. The military judge properly found there was no evidence of selective prosecution.

II. SUFFICIENCY OF SPECIFICATIONS

Appellant also attacked specifications 2 and 3 of Charge I for failure to state an offense. Specification 2 alleges appellant did:

> [O]rally communicate to Airman First Class [D], an enlisted person then in his direct chain of command, certain indecent language, to wit: that Airman First Class [L] "had a nice ass" and that he "was going to get her" and that Airman First Class [S] "had a great body" and that he "wanted her."

With the exception of alleging a different airman to whom the language was communicated, specification 3 alleges identical misconduct, including a comment by appellant that he had sex with Airman S. Before this Court, appellant renews his argument that his comments to Airman D were no more than "bar talk" between men made while he

and Airman D were drinking together.[3] Appellant also argues the language is not indecent, and therefore, the specification fails to state an offense. We disagree.

A specification must apprise an accused of the offense he must be prepared to defend against and also protect against a future prosecution for the same or similar offense. A specification must allege all elements either specifically or by fair implication. *United States v. Schwartz,* 15 M.J. 109 (C.M.A. 1983); *United States v. Sell,* 3 U.S.C.M.A. 202, 11 C.MR 202 (1953) In view of appellant having contested specifications 2 and 3's sufficiency at trial, he is entitled to have them tested in a more critical light than those attacked for the first time on appeal. *United States v. French,* 31 M.J. 57 (C.M.A. 1990). Further, we must test the specifications' sufficiency by the allegations within each specification's four corners. *See French,* 31 M.J. at 59.

Conduct need not constittue a violation of another specific article of the UCMJ to violate Article 133 as long as a service member is on notice of the proscribed conduct, either via custom of the service or otherwise. *Parker v. Levy,* 417 U.S. 733 (1974); *accord United States v. Tedders,* 24 M.J. 176 (1987); *United States v. Boyette,* —— M.J. —— (A.F.C.M.R. 1993) (*en banc*). Accordingly, whether the comments appellant allegedly made are, in fact, indecent is not the determining factor regarding the specifications' sufficiency. It is whether the comments and the circumstances under which they were made could constitute conduct unbecoming an officer. *United States v. Novell,* 26 M.J. 477 (C.M.A. 1988).

The specifications in question clearly placed appellant on notice that he was accused of inappropriate conduct

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[3] The evidence at trial reflected that, in addition to planned evenings of drinking with Airman D, appellant habitually frequented a local pub where he drank and socialized with the enlisted personnel under his supervision.

with regards to his relationship with enlisted personnel under his command, including the use of inappropriate language. Further, while litigating the motion at trial, the prosecution informed the military judge and appellant that the Government was not relying on the indecency of the language as the gravamen of the offense, but the impropriety of appellant's conduct with, and comments to, Airman D. Moreover, appellant gave no indication at trial that he was not on notice his conduct could subject him to disciplinary action. *See Tedders,* 24 M.J. at 181. Although he claimed surprise that his conduct had in fact demeaned him in the eyes of his subordinates, he acknowledged awareness that his conduct was prohibited. After being advised of the definition of indecent language, appellant also admitted at trial that his comments could tend to cause lustful thoughts in Airman D. Language which incites lustful thoughts may be deemed indecent. MCM, Part I, paragraph 89(c) (1984).[4]

The stipulation of fact and appellant's responses during the providency inquiry convince us he knew his conduct was inappropriate for an officer and proscribed by Article 133. Accordingly, we find specifications 2 and 3 of Charge I sufficiently stated an offense to which appellant providently pleaded guilty. *French,* 31 M.J. 57; *Tedder,* 24 M.J. 176; *see also United States v. Cisler,* 33 M.J. 503 (A.F.C.M.R. 1991).

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[4] Although the prosecution asserted the Government was not relying on indecency of the language as the gravamen of the offenses, trial counsel nonetheless recommended the punishment for communicating indecent language be used as the maximum punishment for specifications 2 and 3 of Charge I because indecent language was the most analogous offense. The military judge agreed. As a result, appellant was exposed to one-half the punishment to which he would have been exposed for an Article 133 or 134 fraternization offense. *See* MCM, Part IV, paragraphs 59(e) and 83(e) (1984).

Appellant also attacked the sufficiency of specification 2 of Charge II, which alleged the commission of an indecent act with another. The specific indecent act alleged was appellant and Airman L engaging in sexual intercourse in the presence of appellant's roommate, Major R, who was present in the room at the time and heard appellant's and L's act of sexual intercourse. Relying on *United States v. Jackson,* 30 M.J. 1203 (A.F.C.M.R. 1990), appellant argues that, because neither he nor L touched Major R, the specification fails on its face with regards to committing an indecent act. We disagree.

Fornication in the presence of others, or under conditions where discovery by others is likely, is actionable as an indecent act. A specification alleging such conduct states an offense under Article 134, UCMJ. *United States v. Berry,* 6 U.S.C.M.A. 609, 20 C.M.R. 325 (1956); *United States v. Blake,* 33 M.J. 923 (A.C.M.R. 1991); *see also United States v. Scoby,* 5 M.J. 160 (C.M.A. 1978). In addition to appellant's reliance on Jackson being extremely misplaced, his assertion is also contrary to the long line of precedents cited *ante.* We discern no reason to rule contrary to those precedents.

III. OTHER ISSUES

The military judge properly ruled specification 1 of Charge I (fraternization with Airman L) was not multiplicious for findings with specification 1 of Charge II (adultery). Including the words, "not his wife" in the pleading of specification 1 of Charge I did not implead the adultery offense as an included offense thereof. The current test for multiplicity is whether two offenses contain the same elements. If either offense requires an element not present in the other, the offenses are not multiplicious. *United States v. Teter,* —— M.J. —— (C.M.A. 1993). Applying *Teter,* we find the offenses separate for findings purposes. Further, the military judge instructed the members the offenses were multiplicious for sentenc-

ing. Therefore, appellant was not prejudiced even if the ruling was error.

The issue regarding the military judge's instruction on the impact of a punitive separation on veterans' benefits has been resolved adversely to appellant. *United States v. Longi*, 36 M.J. 988 (A.F.C.M.R. 1993); *United States v. Hansen*, 36 M.J. 599 (A.F.C.M.R. 1992).

IV. SENTENCE SEVERITY

Appellant also avers his sentence is inappropriately severe. We have given individualized consideration to appellant, including the nature and seriousness of the offenses and the character of appellant's service. We do not find the sentence inappropriately severe. *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982); Article 66(c), UCMJ.

The findings and sentence are correct in law and fact, Article 66(c), UCMJ, and, on the basis of the entire record, are hereby

AFFIRMED.

Senior Judges RAICHLE and JAMES concur.

OFFICIAL

NAOMI D. ALLEN
Technical Sergeant, USAF
Chief Court Administrator, AFCMR

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